



POLICE DEPARTMENT

May 21, 2013

MEMORANDUM FOR: Police Commissioner

Re: Detective Kirk Fernandes
Tax Registry No. 934850
Narcotics Borough Brooklyn North
Disciplinary Case No. 2012-7377

The above-named member of the Department appeared before me on March 12, 2013, charged with the following:

1. Said Detective Kirk Fernandes, assigned to Narcotics Borough Brooklyn North, while off-duty on or about January 9, 2012, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that he was involved in a verbal altercation with Person A, which then became physical.

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

The Department was represented by David Bernstein, Esq., Department Advocate's Office, and Respondent was represented by James Moschella, Esq. and Shiva Bahmani, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Person A as a witness.

Person A

Person A has worked as a captain for the New York City Department of Correction since 1999. She is currently in charge of the care, custody and control of inmates, the supervision of officers, and investigations of packages, stabbings, and any incidents in the jails in George Motchan Detention Center on Rikers Island. She is a uniformed employee and a peace officer. As a peace officer she must uphold the law whether on duty or off duty; if she sees a crime being committed out on the street, she is empowered by New York City law to take action. Her tour of duty rotations have been from 7 to 3, 3 to 11, 11 to 7, four days on, two days off for her entire career with the Department of Correction.

She testified that she came to the hearing voluntarily, was not subpoenaed and was originally scheduled to work on the day of the hearing. She made arrangements to come to court by switching a tour.

In the Department of Correction, there is a unit that investigates both on duty or off duty misconduct. Person A agreed that if she were to testify falsely, the Department of Correction could investigate her.

Person A [REDACTED] Respondent for 13 years. They were [REDACTED] on October 17, 1998. They are [REDACTED]
[REDACTED] They have [REDACTED]. They used to live together in [REDACTED] New York.

In November 2010, Person A found out that Respondent was cheating on her. Respondent moved out of [REDACTED] around April of 2011. Sometimes he would come back to [REDACTED] to obtain property or take care of various matters. Before he came over, he would contact his attorney who would contact her attorney to make arrangements. Person A would be advised of the specific time and date that he would be stopping by the house. Then she would make sure she was not home.

Person A described the house as a ranch, one level with a basement, and an attached garage. There is a driveway leading up to the garage. About four cars can fit in that driveway in two rows of two. Just one car can fit inside the garage.

Person A was working on January 9, 2012 from 11:00 p.m. to 7:30 a.m., the midnight shift. She started her shift on January 8, 2012 at 11:00 p.m. After leaving work at 7 a.m. on January 9, 2012 and stopping at her father's house in Queens for breakfast, she came home at about 10:35 a.m. When she pulled up at the house, there was a car she did not recognize parked in the driveway and the garage door was open. The front of the car was backed in and facing the street. She could not see into this car because the windows were tinted. Person A believed the car was a Honda, but was not sure what model. The car was electric blue.

When she backed her car into the driveway beside the Honda, she could see the passenger side windows. She was unable to see inside the windows because they were tinted and rolled up.

She got out of the car, walked towards the garage and saw Fernandes in the garage lifting a box. She asked him why he was here lifting the box. He wasn't supposed to be at the house. He said, "Fuck you, leave me alone." She asked him again, "Why are you

at the house? I didn't know you were coming to the house today." And he said, "Just leave me alone." Then she walked around the back of the Honda to get to the path to the front door of the house.

Fernandes agreed that the back of the Honda would be the side of the Honda that was abutting the garage opening. She started to call her father on her cell phone. Then she noticed that the driver's side door of the Honda was open and the back window on the driver's side was cracked. She saw Respondent's girlfriend and two children inside the car in the back seat.

Respondent's girlfriend said to her, "If I didn't have these kids with me, I would fuck you up." Then Respondent left the garage and came toward her, Person A testified, "in an aggressive manner grabbing me by the shoulder and throwing me to the ground."

He grabbed her with two hands on her left upper arm and on her right upper shoulder. He pushed her with enough force to throw her onto the ground and so that her bag and all its contents fell out on the lawn. She was standing on a concrete walkway when he pushed her. She fell on a grassy area. Then Respondent got into the car and drove off.

Fernandes got up and gathered everything that fell out of her purse onto the lawn. She went into the house to sit down and think for 10 or 15 minutes about what had just happened. She was thinking about what she should do. She called a neighbor who was a friend and a Suffolk County Police Department (SCPD) lieutenant to ask him what he thought and to give her insight.

Person A explained, "Since I'm law enforcement and he's law enforcement, I just wanted – I didn't want this situation to be a big blown up situation. I didn't really

know what to do. I've never been in a situation like this before. . . . I didn't want Kirk to get into any trouble. . . . I've known him since I was seven years old. We have known each other a long time. Our families know each other. And I didn't want him to get into any trouble despite everything."

After speaking to her friend, she decided to file an order of protection, but not a criminal complaint. At the SCPD police station, she spoke with an investigator, who explained her options. When he asked her if she wanted him arrested, she said she did not. She just wanted an order of protection. The investigator told her the steps she needed to take and to go to the courthouse. He gave her information about domestic violence counseling.

Person A described to the officer what had happened earlier that day, the officer then wrote the complaint and she signed it. She obtained the order of protection the day after the incident, on January 10, 2012. Because she was in the precinct for a long time that day, the courthouse was closed.

Fernandes testified that car rims¹ were inside the box that Respondent was holding in his hands earlier that day. There were four boxes of rims in the garage. That day Respondent was able to remove one box. Person A said that the other three boxes still remain in the garage.

The investigator told Person A that Respondent said that he was there to remove the rims and cable boxes. The cable boxes were in Respondent's name, and he disconnected the cable and the phone, along with her cell phone. Person A had asked her attorney to reach out to Respondent's attorney for Respondent to take the boxes from the house so he could return them to the cable company. She made that request more

¹ Person A explained that the rim is what goes on the car, and the tire goes around the rim.

than once. The first request was made in the summer of 2011. He never responded to her requests.

Person A had no idea that Respondent was coming to her home on January 9, 2012. Person A did not know whether she would be working that day or what her tour of duty would be if she had been working that day.

Department's Exhibit (DX) 1A is a picture she took of her left arm on January 9, about 10 minutes after the incident. It shows a slight bruising on the arm in the same area that Respondent grabbed her. Person A pointed to the upper right-hand corner where

slight markings indicate bruising and in the middle. She circled the areas. DX 1B is a photograph of her same arm, from another view which she took on the same day and time as the first picture. This photograph depicts a slight bruise on the arm. Person A circled that area where the bruise was. Person A explained she got those bruises when Respondent grabbed her by the arm.

On cross-examination, Person A agreed that 10 to 15 minutes after this incident she already had bruising on her body as a result of Respondent's contact with her. She took the pictures with her cell phone.

Person A agreed that during or after the interview, the officer prepared a Domestic Incident Report (DIR) (Respondent's Exhibit A). She knows what a DIR is. She agreed that she signed the DIR on page 2. She agreed that on the DIR there is a box that asks whether she was injured. When asked if the box on this DIR says, no, she was not injured during this incident with her husband, Person A asked to see the report. Then she explained that she did not fill out this form, the investigator did. She conceded

that she did review the form before signing it. She confirmed that the box that says, no, she was not injured is checked.

Person A did not tell the officer who interviewed her at the Suffolk County Police Department that she had photos of bruises she got from the incident with Respondent.

On the DIR that she reviewed and signed where it says photos taken, the box, no, was checked. She confirmed that it was not her intention to have Respondent arrested.

When asked if the DIR that she reviewed and signed said that she did want to press charges, she replied, "Press charges meaning order of protection, yes." She agreed that she was familiar with the New York State Penal Law. She said she did not want Respondent arrested. She conceded that the DIR says that she did want to press charges. Person A explained that page 2 of the DIR was filled out by the investigator. She confirmed that she reviewed this statement on page 2.

After Respondent's attorney read the statement on the DIR, she acknowledged that it did not say anything about Respondent grabbing her shoulder. She agreed that after reviewing the DIR she did not correct the officer and tell him to add that Respondent grabbed her shoulder and forced her to the ground. Person A explained, "In the heat of the moment when you go through everything, sometimes you, as an oversight, you don't."

That following day, January 10, a Department investigator contacted her about the incident. She knew, as a corrections supervisor, that based on her allegations a disciplinary proceeding or investigation would be conducted. As a member of law enforcement, she knew that it was likely that Respondent would have his firearms taken

from him, that he would be on administrative modified assignment and that there would be a disciplinary process.

She acknowledged that during the interview on January 10, she never told Department investigators about the photographs that she took.

Person A agreed that Respondent and she were [REDACTED]

[REDACTED] She agreed that the [REDACTED] had been pending for two years and that it was taking a long time. When asked if it has been an [REDACTED] Person A replied, "It's been a lot." When first asked why the [REDACTED] was taking so long, Person A replied, "You can ask your client." Then she explained, "Just court. Going back and forth to court, financial distribution of stuff, the house, the mortgage."

She acknowledged that she filed for [REDACTED] because Respondent was cheating on her with Anny Ceballos. She acknowledged that when she saw Ceballos at her home she was upset. When asked what she meant when she described Respondent as leading a double life, she explained, "He was still in marriage with me where everything was fine. And then I find out he had another life in [REDACTED] with the female in question, and she was -- she had a child for him."

She agreed that when she came home that day, she was not expecting to see Respondent and that it was an unannounced visit, that she was surprised and had never met his girlfriend before. Because she had seen pictures of her, she recognized Ceballos. She indicated that seeing the baby in the car was upsetting and acknowledged that it was an emotional time for her. She said that during the incident voices were raised. She indicated that both she and Respondent were upset. She indicated that he came and threw her to the ground completely unprovoked by her.

She testified, "He approached me in an aggressive manner."

Person A explained, "He didn't expect me to be home at that time, so I thought he was upset because I showed up when he expected to take what he wanted to take without me being there."

She conceded that after he cursed at her, she cursed at him. When asked whether Respondent assaulted her because he was upset that she had come home, Fernandes replied, "He assaulted me, yes."

In response to the Court's question, Person A explained that before he came over to her, "He was like, get the fuck away, leave me alone. I will take what I want. If you are calling the cops, I'm a cop. They are not going to do anything."

On continued cross-examination, when asked if she felt he should not take that property from her garage, Person A said, "Through the [REDACTED] all that stuff was [REDACTED] property, and he was not allowed to take anything from the home without it being communicated through the attorneys." She agreed that as far as she knew, there had been communication through the attorneys. She confirmed that his taking property from the house got her upset. She agreed that after she got the order of protection against him, he could not by law come to the house any more.

She confirmed that when she signed that complaint, she knew that it was a sworn statement. She knew that above where she signed it, the complaint states that false statements are punishable as a misdemeanor, a crime. She acknowledged that she can be fired from her job for committing a crime and that just like Respondent, she is subject to a disciplinary process as a law enforcement officer. She agreed that if she were to admit

in this court that she made an incorrect statement on a sworn document, she could get in trouble.

On redirect examination, she reiterated that she was not subpoenaed to testify and was testifying voluntarily. This was not the first day that she was told this particular proceeding would be set for a Department trial. Twice before she believed that this case was going to trial. She was prepared to appear on those dates and would have appeared voluntarily if those dates were not postponed. She was not subpoenaed for either of those dates.

She stated that her signature did not appear anywhere on the first page of the DIR. After having been asked if she recalled whether she was presented the entire two page document before she signed it or whether she was provided only the statement of allegation, she answered that she reviewed both pages before signing them.

The same day as the incident, she went to the local police precinct to tell the officers what happened. That night she had time to reflect over what had happened.

As far as she knew, she was under no specific legal obligation to obtain the order of protection. When asked by the Court why she decided to get the order, she said, "Because I felt violated." When asked did she not think that by filing this complaint he would get arrested, she said, "The officer reassured me that he wouldn't get arrested." She explained, "The officer, basically he sat down with me and he informed me that since Kirk and I were both law enforcement, that these have serious repercussions, and if I wanted to proceed with this order of protection. And it was up to me if I wanted to proceed with it."

When asked why she filed the complaint, she said, "Because I felt I was violated, I felt -- I was upset that Kirk went so far as to put his hands on me."

When the Court asked had Respondent ever done that before, Person A said yes. In response to continued re-direct examination, Person A answered that Respondent has done this four or five times in the past. Person A did not report these past incidents to the police. She explained, "Because I didn't want Kirk to get into any trouble, and I know the ramifications of if I reported it what would happen." When asked why did she decide to go forward this time with reporting and getting an order of protection, she replied, "I just had enough."

Person A described her injuries from the January 9, 2012 incident as "minor." She told the SCPD officer, "I didn't have any serious injuries, very, very -- just a small bruise, nothing major."

In response to a question on cross-examination, Person A said that the first time that the Department investigator called, she did not mention that she had photographs of the injuries. Person A stated that the investigator did not specifically ask whether there were photographs. In January, when Person A spoke with a Department investigator, Sergeant Martinez, he learned that she had photographs and she gave them to him.

When questioned by the Court why Person A called her father when she saw the car in the driveway, she said, "I'm close with my father and I just wanted him to know. I live alone, and my father lives in Queens, I live in Suffolk. Just to let him know that Kirk was at the house." By the time she called her father, she and Respondent had already exchanged words. She had never seen that car before.

Earlier, Person A had stated what Respondent said to her when he saw her. She now explained that she responded to him, "Stop coming towards me, Kirk." She said this "because he was advancing towards me." Then she repeated, "Kirk, stop coming close to me. Stop fucking coming to me."

On redirect-examination, she characterized her [REDACTED] as "difficult." She explained, "Because of there is still a lot not settled. The finances, the credit card debt, the house, those kinds of things."

On re-cross-examination, Person A clarified that before January 9, 2012, there was never any order of protection against Respondent. She confirmed that there was nothing barring him from being at her house on January 9. She confirmed that he still had a key to the house and that this house was still the [REDACTED] residence. She agreed that although he had moved out before January 9, there was no court order precluding him from coming to the house.

She confirmed that she knew she was making allegations of domestic violence against Respondent and knew exactly what the repercussions of those allegations would be. She acknowledged that the SCPD officer told her about the serious repercussions in making these allegations.

When asked what those repercussions would be, Person A replied, "Where we are right now." She agreed that those repercussions would entail Respondent being modified, having his gun taken from him. When asked if it was likely that Respondent would be arrested, Person A said, "I did not want him arrested, and the officer reassured me that he would not be arrested, and he was not arrested."

When asked by Respondent's attorney if Person A knew what the term "must arrest" means, she said no. In response to further questioning, Person A said, "I was not aware that he would have been arrested." She said she did not go to court the next day, to file a family court petition. She agreed that she went to the criminal court and spoke to a district attorney. When asked what role the district attorney plays in our criminal justice system, she explained, "I don't know completely what a District Attorney does." She acknowledged that a district attorney prosecutes individuals. She agreed that the district attorney who she spoke to on January 10, 2012 was the one who was going to prosecute Respondent.

She admitted she never told the SCPD that there were any past incidents of violence. She agreed that the DIR that she reviewed and signed asks about prior domestic violence history and that the box, no, is checked.

When asked whether when she was interviewed by the Department investigators, did she mention any prior incidents, Person A said, "They didn't ask me that question."

When her answers in her Department interview on January 10, 2012 were read back to her, she admitted that she told the investigator that there were no past incidents of domestic violence. She explained, "When the investigator called me, as you can reflect, I was sleeping when he called me." She confirmed that the interview was by phone. She further explained, "I was just waking up during that question, but I did answer no, because I never reported it before in the past. No, I did not."

She agreed that about a month later, Martinez reinterviewed her about the incident. She confirmed that she never told him that there were any past incidents.

When asked if by the time she spoke with Martinez, Respondent had not already been arrested, Person A replied, "He was not arrested. . . . He was served." Respondent's attorney then asked if she was aware that Respondent had to appear in criminal court to answer her allegations; Person A said yes. When asked if she knew the disposition of that criminal court case, she replied, "I got an order of protection." She agreed that by that time, Respondent had already been served with the order of protection and that when she spoke with Martinez, Respondent had already been served with the order of protection. She agreed that Respondent had already been modified and had firearms restrictions. She agreed that even though these things had already occurred, she still did not mention any past domestic violence incidents.

On re-direct examination, Person A explained that when she was seven years old she met Respondent in Barbados where their families used to go to church together. She explained that not only did their families know each other, but "as teenagers, we had a liking for each other." Years later, she left Barbados to live in the United States. One year she went on vacation in Barbados and spent time with Respondent. When she left, they carried on a long distance relationship, and then Respondent came to live in the United States.

Person A was asked about what she thought when the SCPD officer told her that if she filed domestic abuse allegations there could be serious repercussions; she replied, "After he said that, I needed time to think, so I went outside the precinct and sat on the steps for a minute thinking: Should I, should I not, should I, should I not." When asked why she was undecided then, she said, "Because I care for Kirk. Because he was my [REDACTED] and I didn't want him to get into any trouble. And this not only affects us, it

affects our families, also." She explained, "Our families are very, very close. And all this has taken a toll on both of them, also, not only myself and Kirk."

When asked why she concluded that Respondent was angry with her when she discovered him at her home, she explained, "He was being very loud, and you know, he was cursing, like he was upset that I was there."

Person A clarified that first Respondent started cursing at her while Person A was asking him why he was there and then Ceballos screamed out from the car that "if she didn't have the kids here she will fuck me up."

Respondent's Case

Respondent called Anny Ceballos as a witness. Respondent testified in his own behalf.

Respondent

Respondent has been employed by the Department for about nine years. He is currently on full duty status as an investigator. He has been an investigator for about three-and-a-half years. Until these charges, he has never been the subject of a disciplinary proceeding.

He is married to [REDACTED]. They stopped living together in late 2010, 2011. They were living together in [REDACTED], New York. He is now living with his fiancé, [REDACTED], his newborn son, [REDACTED], his other son, [REDACTED] [REDACTED], who is Ceballos' daughter. [REDACTED] is about 15 months old and [REDACTED] is six

years old. [REDACTED] and [REDACTED] are his sons with Ceballos, and [REDACTED] is Ceballos' daughter from another relationship.

Respondent testified that Person A knew about the children. The last time that he went to his former residence in [REDACTED] was January 9, 2012. He went there to retrieve his cable boxes, tools and some rims. Before January 9 and after he had moved out, he had sometimes gone back to the house. He would go back to the house to do maintenance, which would include covering the pool, covering the shades, removing the washing machine and replacing it with a new one, and changing light bulbs in the house. He had keys to the house. There was no court order precluding him from going to the house. The title of the house is in Respondent's name as well as Person A'.

Respondent testified that there was no arrangement or agreement between himself and Person A for him not to go back to the house. He was always able to go to the house. He explained that their agreement was for him to do preventative maintenance on the house. For example, if the washing machine broke down, he had to replace it. Before he would go to the house, the two would discuss and arrange a day through their attorneys. He would know that the house needed maintenance or an urgent repair because Person A would either contact her attorney who would contact his attorney, or she would text him.

On January 9, when he went to the house, Person A did not know that he was coming. He did not know that she was going to be there. When he arrived at the house, he parked the car in the driveway, with the trunk facing the garage. The car was about five feet from the garage door. He testified, "I opened the trunk of the car. I removed one rim, my tool bag, and put it in the trunk." Then a gray Honda, which he believed was

her car, pulled into the driveway and parked. He saw Person A walk up from the bottom the driveway. He testified, "She was speaking. She was not yelling, shouting, or anything like that. I didn't understand what she was saying. At that point in time, she came to the back of the trunk, which I already closed, and she was saying something, but I still could not understand it. I told her at that time we will discuss this with the attorneys and we will set up tentative dates." Then Respondent got in his car and drove away.

When he first saw Person A, he explained, "I was to the right side of the trunk of the vehicle because I just put the box of rim into the trunk of the car." He agreed that he was already at the car.

Respondent reiterated that Person A was walking up from the bottom of the driveway and "speaking as she was walking up. I did not clearly hear or understand her. Like I said, she was not yelling, shouting. There was no hand gestures or anything. But she was just walking up the driveway, just speaking, but I couldn't clearly hear what she was saying or make out what she was saying."

Respondent testified that he did not say anything to her: "The only time I said anything to her was at the back of the car. I did state we will contact the attorneys and we will do a tentative date where I could retrieve the cable boxes because I did believe she might have put them into the garage at that time." Respondent explained, "I stated to her that because I couldn't understand what she was saying when she came up. I said, I will speak to the attorneys, and we will set up tentative dates where I can get the cable boxes which I came to retrieve, which I do believe she did or was in the process of putting those cable boxes into the garage."

Respondent never retrieved the cable boxes, but did retrieve the tool box and a rim. Ceballos, his son, [REDACTED] and [REDACTED] were seated in the rear seat of his car. The car was not running.

After he told Person A that he was going to have the attorneys discuss his retrieving the rest of the cable boxes, he did not say anything else to her and just got in the car. He said that he did not yell at Person A because "there was no reason to yell." In response to his attorney's questions, he said he did not threaten, grab, push or touch her.

When he got in the car, he left the area and went to work. After he left the area, he had a conversation with Ceballos and the children. He said, "I just explained that, you know, we will have to contact the attorneys and set up a tentative date to collect the cable boxes because of the high monies that were owed on them." Respondent clarified, "Seeing the cable boxes were not returned to Verizon in a timely fashion, I started to incur high rates of fees until they were returned. The fees were "approximately over \$2,000." He and Ceballos did not discuss anything else.

On his way into work, he received a phone call from Officer Johnson of SCPD that his [REDACTED] was at the precinct, a complaint was filed and a summons would be issued. The complaint was for Harassment second degree in which Person A alleged that he grabbed her by the hand and pushed her to the ground, and there were no injuries. He was very surprised to learn about these allegations. Respondent then notified the Internal Affairs Bureau (IAB), his supervisor and his union delegate.

Respondent had to appear in Suffolk County Criminal Court. Ultimately, the judge issued an adjournment in contemplation of dismissal. Respondent was placed on modified assignment for about seven months.

In response to Person A' allegations of past abuse, Respondent testified, "During the course of our marriage, I never had any past domestic incidents with her. I am not saying that two loving couples will never have disagreements. I would not say that we never disagreed on matters in a marriage and in a household."

He stated that he never struck or hit her. Respondent recalled that the grounds for [REDACTED] which Person A filed were for abandonment. There were other grounds that Person A alleged, but Respondent could not recall what those grounds were.

Respondent described his [REDACTED] as "bitter." When the Court asked why, he replied, "It's almost two years where we are going back and forth. In this [REDACTED], the items up for discussion in part are very simple where I am free to negotiate. I just find that from my [REDACTED] it's very -- it's very tough to negotiate stuff for the [REDACTED] with her." He explained, "The issues remaining in this bitter [REDACTED] would be the house, the mortgage, the credit card debt, the cable boxes. . . . Person A is very indecisive of if she wants to keep the house and certain aspects of what have to happen with the disbursement of the house and items in the house. . . . At this present time, I do believe she wants the house. That was her last statement in court."

In response to the Court's questions, Respondent explained that he did not want the house and that Person A knows this. Respondent stated that he is now precluded from going to the house based on the order of protection.

On cross-examination, Respondent agreed that the [REDACTED] is a bitter one, but denied that that his emotions were high. He believed that it was a one-sided bitter [REDACTED]. When asked if he felt he could discuss the house with Person A, he testified, "I am very free and open on my end, yes, to discuss matters. On my end, yes."

Before the incident of January 9, 2012, Respondent said, "We were always civil. We always spoke in [gentle] tones. We aired our objectives. And we, despite this [REDACTED], you know, we had decent, respectable conversations with each other."

Respondent disagreed that the civility between them changed on January 9 or 10, 2012. After being asked when the divorce became bitter, Respondent replied, "The [REDACTED] aspect was bitter, which I am going through right now. Up until January 9th, and still present, I have an open relationship with her whereas I can speak freely. However, there is an order of protection banning me from contact with her. But I am fair to discuss anything in regards to this [REDACTED]." Respondent agreed that because of the order of protection, he has not had spoken with Person A in a year.

Respondent believed that after the incident on January 9, 2012, he went directly to work. When Respondent drove to the house that day, he was coming from his house in [REDACTED]. He did not recall how long a drive was it out to [REDACTED]. He guessed that with traffic it generally takes 45 minutes.

He agreed that his intention when he drove to the house in [REDACTED] was to pick up the cable boxes. He had been getting past due notices from Verizon. Verizon was already charging him for the non-return of the cable boxes. He had previously reached out to Person A and asked her if she could return the cable boxes for him. She told him

that she did not want to do that. This communication about the cable boxes was through the attorneys as well as direct conversation and texting.

When asked how it made him feel that she would not return the cable boxes for him, he said, "I was okay with it." He denied being upset.

Respondent agreed that Person A did not know that he was coming to the house and he did not know whether Person A was working. For all he knew, she could have been home when he came. When he came to the house and saw no cars there, then he knew that she was not home.

After being asked what would he have done if her car was there when he came, he said, "I would have still proceeded to the garage to retrieve the items, and I would have most probably contacted her and let her know that I was taking the items. We did have very civil conversations with me coming to the house." He said if she had been home when he arrived, "I would have rang the doorbell."

He explained that there was agreement about contacting Person A' attorney before going to the home "just for scheduling purposes." He said, "There was nothing banning me from going to the residence, but however, if I had to go to the residence, I was -- we had a civil conversation, agreement, understanding, that I did go to the residence numerous times to do maintenance work and stuff." He explained, "It wasn't uncommon for me to go to the residence" without going through the attorneys.

Respondent agreed that before January 9, Person A would be told that he was coming to the house as well as the date and time that he was coming.

Then the following colloquy ensued between the Assistant Department Advocate and Respondent:

Q. So January 9, 2012 was the first time that you arrived having not given her a heads up, hey, I am going to be at the house doing something?

A. No.

Q. Just a moment ago, you said that every time that you went back to the house prior to January 9th, Ms. Person A knew the date and time you would be coming?

A. Yes.

Q. So on January 9, 2012, she didn't know you were coming?

A. No.

Q. You didn't text her on the way over, hey, I'm coming by?

A. I don't recall.

Q. You didn't pick up the phone and say, hey, I'm coming by?

A. I don't recall.

Respondent said that had Person A been home he would have rung the front doorbell, summoned her to the front door, told her why he was there and then picked up the cable boxes. Since he did not know where the cable boxes were, it would have been helpful if Person A could have told him.

He looked in the garage for one rim, his tool box and the cable boxes. When asked if he thought the cable boxes might be in the garage, Respondent said, "The garage is very neatly organized, which I organized, so they would be on the table directly to my right if they were in the garage."

Because he did not see the cable boxes there, he assumed, they must be inside the house. There were four boxes of rims in the garage. When he went into the garage, the first thing he did was pick up one box of rims and carry it over to his car. The car was backed in to about the garage door opening.

The rim and the tool bag belonged to him and were in the garage. After he put the rim and the tool bag in the trunk, Person A arrived. The tool bag was in the trunk already before she arrived. While she was arriving, he was placing the rim into the trunk of the vehicle.

He agreed that when she got out of the car, she said something to him. He was not sure what she was saying and was unable to hear her. But before he could discern or hear the words she was saying, he said to her, "No, no, we will go through the attorneys." Then he got in the car and drove away. He never obtained the cable boxes and never even identified where they were within the house. He left three out of his four rims behind. He told his girlfriend, "Oh, we will work it out with the attorneys. We will work out another time to come by and obtain the rest of my belongings."

He denied saying, "We will try again tomorrow. There is no problem here. I just need to do it sometime when she is at work."

When asked why he left the house that day, he said, "I left the location because I had to go into work."

He did not remember if he asked Person A, "Hey, where are the cable boxes?" Then the following colloquy ensued:

Q. Well, at the end of the day, you stated you still weren't sure where the cable boxes were located?

A. That is correct.

Q. The only thing you stated to her was we will handle this through your attorneys, correct?

A. Yes.

Q. So you never said to her, oh, Ms. Person A do you know where the cable boxes are? I am here to pick them up.

A. I don't remember if I asked her that.

Respondent admitted that if he wanted at that time to have a constructive conversation with her, he could have done so. He also admitted that it would not have taken a long time to ask Person A where the cable boxes were that she had been asking him to take.

He believed that he had an appointment at Millenium Honda, a car dealership in Hempstead, New York. Respondent admitted that earlier he testified that he went directly to work after leaving the house. The following colloquoy ensued:

- Q. So you didn't go to Millenium Honda that day?
A. I went there at some point in time. I don't recall when exactly I went there."
Q. Your tour of duty that day started at 1227, correct?
A. Yes.
Q. And you went straight from [REDACTED] to your work location, correct?
A. I do believe, yes.
Q. So when you went to Millenium Honda, if you went that day, it would have been after your tour of duty.
A. Possible, yes.
Q. Either it would have been after your tour of duty or before you went to [Brentwood]?
A. I don't recall.

Respondent confirmed that when Person A approached him, she was trying to engage him in a conversation, and speaking in a normal tone. He confirmed that she was not angry. He could not recall her sounding upset. He testified she might have been surprised to see him at the house, but she did not appear surprised to him.

When asked why he did not say he was there to pick up a few things and why he did not ask where the cable boxes were, he replied, "Due to the arrears of the cable boxes, the money that was due, and the back and forth conversations with these cable boxes and trying to retrieve them to return them to the outlet, I do believe at that point in time I just did not want to have this conversation with her." He then agreed that it was his testimony that had he raised the subject, he would have been able to have a constructive conversation with her. The Advocate asked, "But you decided not to?" Respondent replied, "I chose not to."

Respondent agreed that before January 9, 2012, he would regularly reach out to her one-to-one without the attorneys either by cell phone or text. He knew her phone

number. Respondent recalled telling the IAB Command Center telephone operator on January 9, 2012 about Person A: "I don't call her. I don't correspond."

On March 15, 2012, Respondent was asked questions in his official Department interview. The interviewers asked Respondent why he did not want to talk to Fernandes on that day. He replied, "We're going through a divorce. And it is a bitter divorce and I just don't want to have any communication on us. It has something to do with the house, the finances, anything of that nature." The interviewer then asked, "But didn't you say earlier that you guys have a somewhat of an amicable exchange?" Respondent replied, "Yes." The interviewer then asked, "Well why would it be any different that day? Why that day wouldn't you be able to have an amicable exchange?" Respondent did not recall the following answer that he gave: "The divorce just reached a point. I just didn't want - - that day, I -- to be honest with you, I didn't really want to speak to -- I'm not saying that I could not speak to her or have a constructive conversation with her. Yes, I can. I just didn't want to be bothered. I wanted to get the cable boxes, you know, return it back to Verizon, and just leave."

Respondent agreed that he stated that he went directly from the residence at Brentwood into work that morning. When asked whether he recalled telling the investigator that he left because he had some appointments scheduled that day, he said he did not recall. (DX 2, pages 14 and 15 of Respondent's official Department interview, March 15, 2012.)

When asked by the Court why did Respondent say to Person A while she was walking towards him that he was going to go, Respondent answered, "While she was walking up the driveway, we do have a very long driveway. We can fit three to four cars.

She was saying something I did not hear. When she got to the rear of the vehicle, I knew she was saying something. I could not make out what she was saying. That day, I just did not want to have any conversation or contact. That's why I stated to her, we will contact the attorneys, and we will work out a fair date where we can pick up and deal with the cable boxes, which were in arrears."

On redirect examination, Person A explained, "That day, I just did not want to have any conversation with her. There are some days that we do have conversations, and then there are some days that we don't speak and we don't text. That day in question, I chose and I did not want to have any conversations with her." When asked was there a reason for that, he replied, "No, there was no reason."

Respondent was driving a blue four door sedan as a loaner rental because he had to drop off his car at Millenium Honda for service.

When asked if having heard his prior statement that he had an appointment, did he now remember it, Respondent replied, "I know I did have -- I know I did have appointments with Millenium Honda. I did have other job related appointments that day, and I had a pretty big calendar that day." When asked the order of his calendar, Respondent replied, "I do believe it was Millenium Honda, pick up the rental, I was going to try and deal with the cable boxes, return them to the Verizon outlet. I contacted them. And I do believe for job-related purposes, I had a couple of cases on my calendar, which I had to address in Brooklyn Supreme Court." Respondent believed that he took care of the car before he went to Brooklyn Supreme Court. Respondent testified that the Person A' order of protection against him expires March 17, 2013.

On cross-examination, Respondent testified that the attorney representing him in his divorce is the same attorney who was questioning him in the instant hearing.

The cross-examination concluded with the following questions and answers:

- Q. And you stated that you had to address some cases in Brooklyn. That's inside Brooklyn Court?
- A. Yes.
- Q. And that would be during your normal scheduled tour?
- A. Yes.
- Q. That would have started at 12:27?
- A. Yes.
- Q. That wasn't an additional appointment that you had in addition to your work duties?
- A. Correct.

Anny Ceballos

Ceballos is Respondent's girlfriend and the mother of his children, [REDACTED]

[REDACTED] and [REDACTED] Ceballos testified that S[REDACTED] is one year old and [REDACTED] is two weeks. She has a daughter from another relationship, [REDACTED] who is six years old.

On January 9, 2012, [REDACTED] was four months. Ceballos testified that she was with [REDACTED] and [REDACTED] in the back of the car. The car was near the garage in the driveway at the house in [REDACTED]. She went with Respondent "to pick up some of his property he had over there." She was waiting in the back seat for Respondent while he got out of the car "to get some of his stuff out of the garage."

While waiting, she saw that Person A "pulled up in front of the house. And she walked up to where [Respondent] was at, was at the back of the car putting some stuff in the trunk. And I seen her talking. But then after that he came around the car and left the house."

The car was facing the street. Ceballos was facing the street so that she saw Person A come home and walk towards the car. Ceballos said that Person A saw her. Ceballos did not say anything to her. She did not recall Person A saying anything to her. Ceballos "just saw her talking and then Kirk just came around and she came and looked in the back of the car where the baby was sitting at. He came in, got into the car, and drove off."

Although she saw Person A talking, Ceballos did not hear what she said. Ceballos testified, "she seemed a little upset." Ceballos did not see Respondent speaking to Person A, but "just saw when he came into the car."

When asked if she saw Respondent grab or push Person A to the ground, Ceballos replied, "Absolutely not." When asked if there was any physical contact between the two of them, Ceballos stated, "Not at all."

Respondent, Ceballos testified, "got into the car. He drove off and he said he is going to let the attorneys deal with it." Ceballos explained, "He is going to let the attorneys deal with getting his stuff back from the house."

Ceballos and Respondent did not discuss anything else. When asked if they discussed if there was an interaction between Respondent and Person A, Ceballos said no.

After driving away, they "went to see if the truck was ready." Ceballos testified, "We had a rental. And then after that, Kirk left to work, and I stayed and waited for the truck."

On cross-examination, Ceballos agreed that she and Respondent were going to the house to retrieve Respondent's cable boxes. She agreed that they left from their home in

[REDACTED] She indicated that was about a 45 minute drive out to [REDACTED] She stated that she had no idea whether Person A was going to be home.

She conceded that she did talk with Respondent in the car about whether or not Person A would be home. When asked what they said, Ceballos replied, "He said he was told by the attorney that she was aware that he can go pick up his property at the house."

When asked again whether Respondent ever said anything to her about whether Person A was going to be there that day, Ceballos said no.

In response to the Advocate's repeating her statement that Person A seemed upset, Ceballos volunteered, "She seemed upset when she saw the baby." When asked how Person A seemed upset, Ceballos said, "She looked at the baby in the car and got a bad look."

When asked if Person A ever said anything to Respondent about the baby, Ceballos, replied, "I wouldn't know. I didn't hear what they were talking about."

Ceballos agreed that for Person A to see the baby, she had to be right next to the car. Ceballos disagreed that the window was down and described the windows of the car as "not too dark" and having a "light tint."

Ceballos maintained that, despite this tint, somebody standing outside of the vehicle could see inside. When asked if Respondent had retrieved any of his belongings by the time Person A arrived, Ceballos said, "I think he got his tire, his rims." When asked if Respondent got all of them or only some of them, Ceballos replied, "His tires and I think his tools. That's it." She did not know whether Respondent got all the tires he was intending or whether there were more.

Ceballos maintained that Respondent told her that he and Person A will just handle this through the attorneys, and that was the end of their discussion about what had happened. Ceballos never followed up with Respondent and said, "Hey, what happened out there?" She did not ask him why they could not get what they needed right then. She did not ask Respondent why they could not come back the next day when Person A was not at home.

Ceballos was asked why did she not ask a single follow-up question when Respondent said it would be handled through the attorneys. Ceballos responded, "That's what he said, it will be handled through the attorneys. I wouldn't ask him no other way. Let the attorneys deal with it, that's it."

Ceballos confirmed that she intends to marry Respondent but cannot do so until his [REDACTED] is finalized. She acknowledged that she came to Court with Respondent.

Ceballos agreed that Respondent told her that Person A filed an order of protection against him. She stated that she did not see anything that would require an order of protection.

Ceballos drove with Respondent to Court and knew why she was coming. She discussed with Respondent that she could not believe that they were coming down here based on nothing. She disagreed that the two of them talked about Fernandes' actions on the morning of January 9, 2012. She stated that they did not discuss that at all.

She conveyed that the only discussions that she had with Respondent about the events of January 9, 2012 were "just when it recently happened, not after that." She clarified that the discussion took place "the same time, maybe on the 10th, the same week

when she (referring to Person A) said the incident happened.” Ceballos further clarified that it was a few days after January 9, on January 10 or 11.

She confirmed that after this conversation, she did not discuss the case with Respondent. She did not discuss the case with him before he went to criminal court. She conceded that when he came back from criminal court she did ask Respondent how it went. He told her they gave him the order of protection, and they took his guns away. Ceballos added, “and that’s it.” Upon further questioning, Ceballos acknowledged that she indicated to Respondent, “. . . I can’t believe this is happening. Why would she do that?”

When asked if it was still her testimony that a couple of days after the incident, she did not discuss the case with Respondent, Ceballo replied, “No, he got modified and got the order of protection. I didn’t discuss anything about that.” She confirmed that even that morning, other than saying that they were on their way to a Department proceeding, they did not discuss the case. She agreed that she has lived with Respondent in the same residence from January 9, 2012 until the day of this hearing.

FINDINGS AND ANALYSIS

Respondent is charged with engaging in a verbal and physical altercation with his [REDACTED] on January 9, 2012.

Respondent and his [REDACTED], [REDACTED] Person A, were married for 13 years. Person A filed for [REDACTED] when she discovered that Respondent was involved with Ceballos. Respondent moved out of the marital residence at [REDACTED], New York in April 2011.

On January 9, 2012, Respondent and Person A were in the middle of a difficult and lengthy [REDACTED] and still are.

It is undisputed that on January 9, 2012, Respondent drove in his car with Ceballos and their baby to the house where Respondent used to live and where Person A still lives. Respondent came to pick up his cable boxes, tools and some rims. After looking in the garage, he picked up one box of rims and a tool box and put them in the trunk of his car. Then Person A unexpectedly drove home. As a result of the interaction between Person A and Respondent, Respondent left without getting the cable boxes and the other three boxes of rims that he had come to retrieve. Person A filed a complaint against Respondent alleging Harassment and was given an order of protection in the criminal court. The case was ultimately adjourned in contemplation of dismissal.

Person A testified that, after Respondent moved out, they had an agreement that before Respondent came to her home, his lawyer would contact her lawyer to work out a day and time for Respondent to come to do repairs or pick up his property and Person A would arrange to not be there. Respondent testified that while sometimes he and Person A would communicate through their attorneys, there was no formal agreement and they would sometimes communicate directly through cell phone or text messages about Respondent coming to the home to do repairs.

Person A said that when she came home on January 9, 2012, she saw a car she did not recognize parked in her driveway. She got out of the car, walked towards the garage and saw Respondent in the garage lifting a box. She asked him why he was there because he was not supposed to be at the house. He said, "Fuck you, leave me alone." She asked him again, "Why are you at the house? I didn't know you were coming to the

house today." And he said, "Just leave me alone." Then she walked around the back of his car to get to the path to the front door of the house.

She started to call her father on her cell phone to let him know that Respondent was at the house. Then she noticed Respondent's girlfriend and two children inside the car in the back seat. Person A admitted on cross-examination that she was angry that Respondent came to her home without any warning, and she was also very upset to see Ceballos and the baby in the car. Ceballos said to her, "If I didn't have these kids with me, I would fuck you up."

Respondent left the garage and came toward her "in an aggressive manner" saying, "Get the fuck away, leave me alone. I will take what I want. If you are calling the cops, I'm a cop. They are not going to do anything."

Person A said, "Stop coming towards me, Kirk." She repeated, "Kirk, stop coming close to me. Stop fucking coming to me."

He grabbed her with his two hands on her left upper arm and on her right upper shoulder. Then he pushed her with enough force to throw her onto the ground and so that her bag and all its contents fell out on the lawn. Respondent then jumped in the car and drove off.

About 10 to 15 minutes later, Person A took two pictures with her cell phone of the bruises she got from Respondent's grabbing her.

She was not certain what to do after Respondent left. She was ambivalent because she did not want to get Respondent in trouble or for him to be arrested. She called a friend, a lieutenant in SCPD, for advice. After reflecting on her friend's advice, she decided to get an order of protection. She went to the police precinct to file a

complaint and the next day she obtained an order of protection from the court.

Respondent was issued a desk appearance ticket.

Respondent testified that he drove to the [REDACTED] residence to pick up cable boxes for which Verizon was charging him. He had previously asked Person A to return the boxes to him and she had refused. When Person A arrived, he was putting one of the boxes of rims into the trunk. He saw Person A pull into the driveway, park, and walk up from the bottom of the driveway. He heard her speaking as she walked up the driveway. He testified, "She was not yelling, shouting, or anything like that. I didn't understand what she was saying." He continued, "She came to the back of the trunk, which I already closed, and she was saying something, but I still could not understand it. I told her at that time we will discuss this with the attorneys and we will set up tentative dates."

Respondent admitted on cross-examination that since Person A was not angry, he could have easily explained to her why he was there and retrieved all of his belongings. As Person A approached him, he decided for "no reason" that he "just did not want to have any conversation with her." Then Respondent got in his car and drove away.

When he left, Respondent never took the cable boxes or all of the rims he had come to retrieve. He denied yelling at, threatening, grabbing or pushing Person A.

Ceballos testified that she came with Respondent in his car that day to pick up some of Respondent's property. She saw Person A, but she did not hear the conversation between Respondent and Person A or see any physical contact between them.

Respondent's attorney emphasized that Person A could not be considered credible because her statements in the DIR were inconsistent with her testimony. Respondent's attorney argued that Person A had said she did not want Respondent arrested, yet she signed this inaccurate DIR and, as a captain with the Department of Correction, knew what the consequences to Respondent would be. She did not tell the investigators that there were previous domestic violence incidents, yet she told the Court that there had been. She did not mention any injuries when she was first interviewed, yet she claimed later she had taken photographs of bruises. She did not initially tell the detectives about her pictures. She testified that Respondent grabbed her by the shoulder, but her signed statement did not mention this detail.

Respondent's attorney argued that Person A was furious and upset that Respondent came to her home without telling her and even more angry that he came with the woman and child who were the reason for her [REDACTED]. Respondent's attorney also contended that because [REDACTED] wanted to keep Respondent from coming to her house again, she made up a story about how Respondent hit her and took pictures of unrelated bruises weeks later.

These arguments are unconvincing. Person A testified credibly that she spoke with the police about Respondent not being arrested, and was told that he would receive a summons. Person A was making a distinction between Respondent being lead away in handcuffs, held in the precinct and then processed through arraignments and the criminal court instead of being issued a desk appearance ticket for a violation. Person A testified forthrightly that she understood the consequences of her allegations to Respondent's career with the Department.

Person A did not report that she was injured, because she had received a minor bruise which did not cause her pain or need medical attention. Indeed, the photographs depict only a minor bruise. The difference between the detail in the DIR about Respondent grabbing Person A' shoulder and the description she gave in the courtroom about being grabbed by her arm cannot be considered a major contradiction. Even when the Advocate tried to lead Person A to say that she did not read the first page of the DIR she signed, she still answered that she had reviewed both pages. This answer was consistent with her testimony earlier that she reviewed the document and her indication that, "in the heat of the moment," she did not pay attention to which boxes were checked.

Person A expressed ambivalence about making this complaint, and her behavior was consistent with ambivalence. She did not tell the police about any history of domestic violence because she had never wanted to make and had never before made any complaint about that. She was reluctant to file a claim against the man who was her [REDACTED] for 13 years and for whom she still cared. She explained that the claim affects both of their families who are still "very, very close." Her testimony was consistent with a woman who did not want to cause problems for Respondent, but wanted to protect herself and felt "violated."

In contrast, Respondent's testimony was inconsistent and not credible. Among the inconsistencies was his testimony that before January 9, 2012 he would regularly reach out to Person A by cell phone or text messages. This testimony directly contradicts the information he gave IAB when he told the operator, "I don't call her. I don't correspond." This contradiction indicates that Respondent and Person A had an

understanding that Respondent would come to the house only after both of their attorneys made the arrangements.

But the most glaring problem with Respondent's testimony is that it does not support his attorney's argument. Respondent described Person A as speaking that day "in a normal, civilized tone" and not sounding angry or upset. This description contradicts the admission elicited by Respondent's attorney from Person A that she was upset and angry to discover Respondent with his paramour and their newborn at her home. Respondent's description also contradicts Ceballos' testimony that Person A seemed upset and "got a bad look" when she saw the baby in the car. Finally, if Person A was not angry and was not yelling, Respondent's deciding to leave immediately for "no reason" without gathering the items he came for and for which Verizon was charging him makes no sense.

For all of the above reasons, the Department proved by a preponderance of the evidence that there was a verbal and physical altercation between Respondent and Person A. Therefore, Respondent is found Guilty.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on July 1, 2004. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

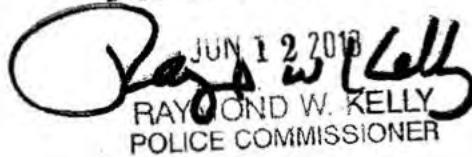
The Advocate recommended a penalty of ten vacation days. Based on Case No. 84970/09 (July 15, 2009), Case No. 5308/11 (January 31, 2012) and Case No. 2293/10 (June 26, 2012) in which officers with no prior disciplinary records were found guilty of engaging in physical altercations with their spouses, the Department's recommendation is appropriate. Accordingly, it is recommended that Respondent forfeit 10 vacation days.

Respectfully submitted,



Amy J. Porter
Assistant Deputy Commissioner Trials

APPROVED



JUN 12 2010
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER KIRK FERNANDES
TAX REGISTRY NO. 934850
DISCIPLINARY CASE NO. 2012-7377

For his last three annual performance evaluations, Respondent received two ratings of 4.5 ("Extremely Competent/Highly Competent") and a rating of 3.5 ("Highly Competent/Competent"). He has been awarded one medal for Meritorious Police Duty.

[REDACTED] He has made 522 arrests. Respondent has no prior formal disciplinary record. He is currently on Level 2 Disciplinary Monitoring.

For your consideration.


Amy J. Porter
Assistant Deputy Commissioner Trials